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No. 07-1328

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IN THE

Supreme Court of the United States

ROSA ACUNA, INDIVIDUALLY,

Petitioner,

v.

SHELDON C. TURKISH, M.D., AND THE OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

SUPPLEMENTAL BRIEF

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ARGUMENT

A RECENT *EN BANC* DECISION OF THE EIGHTH CIRCUIT NOT ONLY IS IN DIRECT CONFLICT WITH THE DECISION OF THE NEW JERSEY SUPREME COURT, BUT SERVES TO HIGHLIGHT THE FACT THAT SIGNIFICANT CONSTITUTIONAL ISSUES ARE RAISED BY THE PETITION. AS A RESULT, THIS DECISION CONFIRMS THAT CERTIORARI MUST BE GRANTED IN THIS MATTER.

On June 27, 2008, the United States Court of Appeals for the Eighth Circuit, sitting *en banc*, issued its decision in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (hereinafter *Rounds en banc*). This Supplemental Brief is being submitted pursuant to this Court's Rule 15.8 to bring this decision to the attention of the Court. This decision is not only relevant to the issues raised by this matter, but indeed is in direct conflict with the decision of the New Jersey Supreme Court which is the subject of the Petition for Certiorari.

In the *Rounds en banc* decision, the issue before the Eighth Circuit was whether a statute enacted in 2005 in South Dakota should have been preliminarily enjoined. This statute, S.D.C.L. 34-23A-10.1 (as amended by 2005 S.D. Laws 186, § 7), is part of the South Dakota statutes regulating the performance of abortions. It sets out what the physician must disclose to the pregnant mother contemplating abortion as part

of the informed consent process. Prior to 2005, the language of the provision was substantially similar to the Pennsylvania provision upheld by this Court in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). But in 2005 the South Dakota Legislature, after concluding that the "*Casey*" disclosures failed to adequately inform pregnant mothers of the facts relevant to their decisions, while realizing that women who had undergone abortions without adequate information were at risk of extreme emotional distress including depression and suicide, rewrote the statute to require the physician to make additional disclosures.

Among the additional disclosures mandated by the 2005 legislation is the very same disclosure that Mrs. Acuna had asserted in this matter she should have been given. Thus, this statute mandates that the physician disclose "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being," S.D.C.L. 34-23A-10.1(1)(b), where the statutory definitions specifically indicate that the term "human being" is being used solely in its medical and scientific sense, as "an individual living member of the species of Homo sapiens," S.D.C.L. 34-23A-1 (as amended by 2005 S.D. Laws 186, § 8).

In the case *sub judice*, what Mrs. Acuna has been asserting is that she should have been informed that procedure Dr. Turkish recommended to her, would terminate the life of a whole living human being, in the biological sense, either as a matter of the original disclosures that Dr. Turkish gave when seeking her consent, or certainly once she asked Dr. Turkish if her "baby is already there." In this regard, it is important to keep in mind that it is clear that all Mrs. Acuna has

been seeking was a statement from the scientific and medical perspective, not from any philosophical or moral perspective. If Dr. Turkish had said something that what he proposed to "evacuate" was to the effect that speaking strictly as a matter of science a living human being, but that regardless it would be her decision about whether to undergo the abortion, it would have been sufficient. Once she was provided with a disclosure of this kind, Mrs. Acuna would have been in a better position to apply her own personal philosophical and moral perspectives and values to the question of how to proceed. Indeed, it was only after being provided a disclosure of this kind, a disclosure of the scientific/medical information about the status of her unborn child, that she would be in the proper position to make a truly informed decision about whether to have the abortion. If the South Dakota statute had applied to her abortion, there is no question that she would have received essentially the very information she asserts she should have received, and she would not have consented to the abortion procedure.

After the South Dakota statute was adopted in 2005, the local Planned Parenthood affiliate, together with its medical director, brought an action in federal court challenging the statute. They alleged that the disclosures were a violation of the freedom of speech rights of the physicians as well as an undue burden on the woman's rights to have an abortion. The District Court Judge entered a preliminary injunction. *Planned Parenthood Minnesota v. Rounds*, 375 F.Supp.2d 881, 889 (D.S.D. 2005) (hereinafter *Rounds District Court*), *rev'd*, 530 F.3d 724 (8th Cir. 2008) (*en banc*). The Judge concluded that Planned Parenthood had made a sufficient showing that it would succeed in establishing

that the human being disclosure violated the speech rights of the physician, by compelling the physician to participate in the dissemination of an ideological message. *Id.* at 885-888. The Judge's sole basis for concluding that the information mandated by the statute was ideological was statements made by this Court in *Roe v. Wade*, 410 U.S. 113, 159 (1973), and *Casey*, 505 U.S. at 846. *Rounds District Court*, 375 F.Supp.2d at 887.

The original panel decision of the appeal of this injunction was reported at *Planned Parenthood Minnesota v. Rounds*, 467 F.3d 716 (8th Cir. 2006) (hereinafter *Rounds Panel*), *rev'd en banc*, 530 F.3d 724 (8th Cir. 2008). This decision would have affirmed the injunction by split decision. The two judges in the majority of the panel likewise concluded that the disclosure was ideological in nature based on this Court's statements in *Roe*, stating that "the factual underpinning" of the Court's conclusion that Texas did not have a compelling interest in forbidding abortion from the moment of conception was "the Court's finding that there was no medical, scientific, or moral consensus about when life begins, making the question of when a fetus or embryo becomes a human being one of individual conscience and belief." *Id.* at 724 (citing *Roe v. Wade*, *supra*, 410 U.S. at 159-163). Indeed, the panel majority concluded that this finding constituted a "legislative fact" that the lower federal courts were bound to accept. *Id.*

This panel decision was of course vacated when the full Eighth Circuit decided to grant rehearing *en banc*. In the *Rounds en banc* decision, the full Eight Circuit

announced its decision after rehearing the matter. A majority of the Circuit judges concluded that the injunction was improperly entered and so had to be vacated. These judges recognized that while the state cannot compel the dissemination of ideology, at the same time the state can require physicians to provide patients with truthful, nonmisleading information relevant to the decision to undergo an abortion. *Rounds en banc*, *supra*, 530 F.3d at 734-735. The majority rejected the contention that the disclosure was a statement of ideology. *Id.* at 735; *see also id.* at 736 n. 9. The majority noted that this contention was based on the premise that in practice the disclosure would not include the statutory definition limiting the term "human being" to its scientific and medical meaning. *Id.* The majority observed that there was no basis for this premise, observing that the canons of statutory construction provide that it is not only possible but proper for the physician to take the definition into account when drafting the disclosure to be given to patients. *Id.* at 735. Once the limiting definition is taken into account, the majority concluded that the disclosure was not a statement of ideology but rather strictly a statement of science and medicine. *Id.* at 735-736. It further concluded that there was nothing in the record to establish that the information was untruthful or misleading. *Id.* The majority therefore held that Plaintiffs had failed to establish that the statute violates the speech rights of the physicians. *Id.*

The two Circuit judges who formed the majority of the original panel, together with two other Circuit judges, dissented from the *en banc* opinion. *Id.* at 738-753. They adhered to the view expressed in the panel

decision (*Rounds Panel*), that the disclosure was ideological. *Rounds en banc*, *supra*, 530 F.3d at 741-747. Once again, they put great weight on this Court's statements in *Roe*. What is particularly noteworthy about this dissent is that they cited to the New Jersey Supreme Court's decision in *Acuna* as support for their position. *Id.* at 743-744; *see also id.* at 745.

In the same way that the *Rounds en banc* dissent cited to *Acuna*, the New Jersey Supreme Court in *Acuna* cited to the panel decision in the *Rounds Panel* decision (which as noted above was the foundation – not only in terms of rationale but in terms of participating judges – for the *Rounds en banc* dissent). *Acuna v. Turkish*, 930 A.2d 416, 427 (N.J. 2007). These cross-references are not surprising. Just as the *Rounds en banc* dissent felt that this Court's statements in *Roe* and *Casey* and progeny required it to conclude that the disclosure in question was ideology, so too did the New Jersey court. *Acuna*, *supra*, 930 A.2d at 426 (quoting *Roe* and *Casey*); *see also id.* at 427 (stating that what Plaintiff sought was the disclosure of "ideological point of view").

The *Acuna* Court accepted that a physician has the duty to provide the patient with all medical information that a reasonably prudent patient would find material before deciding whether to undergo a medical procedure. *Id.* at 425. It did not question the concept, recognized in its previous cases, *see Procanik by Procanik v. Cillo*, 478 A.2d 755, 760 (N.J. 1984), *see also Draper v. Jasionowski*, 858 A.2d 1141, 1146 (N.J.App. Div. 2004), that the physician has the duty to provide information about the impact of the procedure on the

unborn child, which would include risk of death. Indeed, the *Acuna* Court stated expressly that the physician has the duty to provide the pregnant mother with information about the "gestational stage" of the child. *Acuna*, *supra*, 930 A.2d at 428. The only reason that the Court held that the disclosure was not required in Mrs. Acuna's case was its conclusion that the disclosure that the procedure would terminate the life of a human being was a statement of ideology, not an accurate statement of scientific/medical fact. The members of the Court believed that the term "human being" could never be used in describing the unborn child, regardless of perspective or context, because the term was ideology. They believed that any use of the term "human being" is ideology solely because of what this Court said in *Roe* and *Casey*.

While the *Acuna* Court specifically declined to address the issue of whether Mrs. Acuna's proposed disclosure would create a compelled speech violation, there can be no question but that its decision to reject the disclosure was driven by its determination that the disclosure was a statement of ideology. Nor is there any question but that not just the *Acuna* Court but every court that has concluded that any statement to the effect the unborn child is a living human being is a statement of ideology has been driven by the belief that this conclusion is dictated by this Court's statements in *Roe*. Any questions in that regard are resolved by simply reading the opinions.

These opinions demonstrate dramatically that not just the members of the New Jersey Supreme Court but other judges have been confused and confounded by this Court's statements in *Roe*. *See* Petition for

Certiorari, at 14. These judges believe that they are precluded by *Roe* from even considering whether it can be established that from the scientific and medical perspective that what is aborted is a living human being. Rather, these judges believe that regardless of whether one is speaking from a scientific and medical perspective or a more metaphysical perspective the law can never use the term "human being" to refer to the unborn child. This Court should grant Certiorari if only to clarify that this is not what was meant by the statements in *Roe*.

Beyond that, this Court should grant Certiorari in order to resolve the conflict between *Rounds en banc* and *Acuna*. In *Acuna*, the New Jersey Supreme Court held that this Court's decisions in *Roe* and progeny dictate a conclusion that any statement that the unborn child is a living human being, even if limited to the medical and scientific perspective, is inherently a statement of ideology. In *Rounds en banc*, the Eighth Circuit held directly opposite. There is a clear conflict between the two decisions.

Indeed, the very fact that the dissent in *Rounds en banc* and the *Acuna* Court referenced each other only serves to confirm that there is this conflict. Only this Court can resolve the conflict.

CONCLUSION

The Eighth Circuit's recent *en banc* decision in *Planned Parenthood v. Rounds* in direct conflict with the decision of the New Jersey Supreme Court in *Acuna v. Turkish*. Further, the *Rounds en banc* decision highlights why the *Acuna* matter raises important constitutional issues. Thus, the *Rounds en banc* decision confirms that the Petition for Certiorari must be granted as to the *Acuna* matter.

Respectfully submitted,

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